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March 4, 2005

VIA EMAIL AND OVERNIGHT DELIVERY

Ms. Mary Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110

Re: D.T.E. 04-33: Petition of Verizon New England, Inc. for Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts, Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order

Dear Ms. Cottrell:

BridgeCom International, Inc., Broadview Networks, Inc., Broadview NP Acquisition Corp., A.R.C. Networks, Inc. d/b/a/ InfoHighway Communications Corp., DSCI Corporation, XO Massachusetts, Inc. and XO Communications, Inc., through counsel, hereby submit the enclosed Petition for Emergency Declaratory Relief to prevent Verizon from breaching its interconnection agreements by ending the offering of certain UNEs and UNE combinations. This Petition is to be filed in the above-captioned proceeding.

Enclosed is an original and ten (10) copies of the Petition, as well as a duplicate of this filing and a self-addressed, postage-paid envelope. Please date-stamp the duplicate upon receipt and return it in the envelope provided. Should you have any questions regarding this filing, please contact the undersigned at (202) 955-9869.

Respectfully submitted,

Karly E. Baraga

cc: D.T.E. 04-33 Service List

DC01/BARAK/231921.1

STATE OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England, Inc. for Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts, Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order	**Docket No. DTE-04-33**

PETITION FOR EMERGENCY DECLARATORY RELIEF

BridgeCom International, Inc., Broadview Networks, Inc., Broadview NP Acquisition Corp., A.R.C. Networks Inc. d/b/a InfoHighway Communications Corp., DSCI Corporation, XO Massachusetts, Inc. and XO Communications, Inc., ("Petitioners") file this Petition for Emergency Declaratory Relief to prevent Verizon New England, Inc. ("Verizon") from breaching its interconnection agreements ("Agreement") with Petitioners by prematurely ending the offering of certain unbundled network elements ("UNEs") and UNE combinations.

Specifically, Verizon has stated that it will reject Unbundled Network Element Platform ("UNE-P") orders with due dates of March 11, 2005 or later, pursuant to its interpretation of the FCC's recently issued *Triennial Review Remand Order.*[1] Further, Verizon has informed competitive local exchange carriers ("CLECs") that it will not honor orders for dedicated DS1 and DS3 transport, and DS1 and DS3 high-capacity loops

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* , WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) ("*Triennial Review Remand Order*").

on or after March 11, 2005 if those orders fall within the wire center classifications filed by Verizon with the Federal Communications Commission ("FCC").

Verizon's stated course of action would breach Petitioners' Agreements in at least two respects: (i) by rejecting UNE and UNE combination orders that Verizon is obligated by the Agreements to accept and process; and (ii) by refusing to comply with the change of law procedures established by the Agreements.

Contrary to the industry notices posted on Verizon's website, the *Triennial Review Remand Order* does not excuse or justify Verizon's stated intention of rejecting local switching, or DS1 and DS3 loops and transport orders as of March 11, 2005. The *Triennial Review Remand Order* requires that the FCC's findings be implemented through changes to parties' interconnection agreements. Implementing the changes in law associated with the Triennial Review Remand Order will not be an academic exercise because the parties will need to address, among other issues, Verizon's duty to continue to provide UNE loops, transport and local switching to Petitioners at current rates under that Order, state law and Section 271 of the Telecommunications Act of 1996 ("1996 Act").

Unless the Department declares that Verizon may not unilaterally reject such UNE orders, and instead must comply with the change of law provisions in its Agreements, the Petitioners will sustain immediate and irreparable injury. The Petitioners therefore request that the Department consider this matter on an emergency basis and immediately grant the relief requested in this Petition. Specifically, the Petitioners urge the Department to order:

- Verizon to continue accepting and processing all UNE orders under the rates, terms and conditions of its Agreements;

- Verizon to comply with the change of law provisions of its Agreements with regard to the implementation of the *Triennial Review Remand Order*; and
- such further relief as the Department deems just and appropriate.

I. VERIZON HAS NOTIFIED CLECS THAT IT WILL REFUSE TO ACCEPT AND PROCESS NEW UNE ORDERS FOR COMPLETION ON OR AFTER MARCH 11, 2005

By a February 10, 2005 posting on its website, Verizon notified CLECs of its planned implementation of the local switching provisions of the *Triennial Review Remand Order.*[2] In particular, Verizon advised CLECs that they may not submit orders for new facilities or arrangements that are Discontinued Facilities, such as UNE-P, for completion on or after March 11, 2005. Unless CLECs have made alternative arrangements with Verizon for UNE-P replacement services, Verizon added, their embedded base of UNE-P lines in place on or after March 11, 2005 will be subject to the transitional rate increases established in the *Triennial Review Remand Order* as of that date.

Each of the Petitioners responded to Verizon's industry notice by letter, informing Verizon that Verizon's failure to provide unbundled local switching, high-capacity transport, or high-capacity loops as provided for in its Agreements would be a material breach of those Agreements. Verizon's written responses to those letters reiterated its unwillingness to negotiate terms related to the submission of new UNE-P orders for completion on or after March 11 and its contention that negotiation is not required to implement the findings of the *Triennial Review Remand Order.* Further, on March 2, 2005, Verizon informed CLECs, through a posting on the Verizon Wholesale website,

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[2] *See* http://www22.verizon.com/wholesale/library/local/industryletters/1,,east-wholesale-resources-2005_industry_letters-clecs-02_11c,00.html.

that it has filed with the FCC a list of Tier 1 and Tier 2 wire centers that it believes identify the routes on which CLECs are not impaired without access to DS1 and DS3 dedicated transport and a separate list of wire centers that it maintains satisfy the FCC's non-impairment findings for DS1 and DS3 loops.[3] Verizon asserted that CLECs are to be held to have "actual or constructive knowledge" of the Verizon lists and that it intends to treat CLECs that submit DS1 and DS3 UNE loop and/or transport orders in good faith disagreement with those lists to be operating in bad faith and in breach of their interconnection agreements. Verizon strongly suggests that it will ignore the FCC's explicit instructions and refuse to honor DS1 and DS3 loop and transport orders that fall within the wire center classifications contained on its lists.

Verizon's responses show that Department intervention is necessary to compel Verizon to comply with its obligations under its Agreements and the *Triennial Review Remand Order*.

II. VERIZON IS BOUND BY ITS AGREEMENTS TO FOLLOW CHANGE IN LAW PROVISIONS AND CANNOT UNILATERALLY DISCONTINUE PROVISIONING UNES

The rights of CLECs to obtain access to UNEs pursuant to section 251 of the 1996 Act, and the obligations of ILECs to provision such elements, must be set forth in *and governed by* interconnection agreements negotiated and arbitrated pursuant to section 252 of the Act. Section 251(c) states that incumbent local exchange carriers have "the duty to provide to any requesting telecommunications carrier for the provision of a telecommunication service, non-discriminatory access to network elements on an

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[3] http://www22.verizon.com/wholesale/library/local/industryletters/1,,east-wholesale-resources-2005_industry_letters-clecs-03_02,00.html

unbundled basis . . . in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[4]

The 1996 Act is, put simply, built on rights and obligations set forth in interconnection agreements negotiated and amended pursuant to section 252 of the Act. As Verizon itself has noted, even state-supervised tariffs may not be substituted for terms of an interconnection agreement.[5]

Here, Verizon seeks to alter its rights, not by negotiating changes to the interconnection agreements that specify those rights; not even by attempting to file amendments to its tariffs. Verizon takes the audacious position that it can unilaterally alter its rights and obligations to an entire industry merely by posting notice on its electronic bulletin board. Verizon's website is a convenience, not a vehicle for altering legal rights, and Verizon's attempt to use it as such is blatantly unlawful. The only lawful way that Verizon may modify its rights with respect to the provision of UNEs and UNE combinations is by amending its interconnection agreements. The FCC itself was explicit on this topic, stating that the proper means by which the *Triennial Review Remand Order* should be effectuated is pursuant to section 252 negotiations:

> We expect that incumbent LEC and competing carriers will implement the Commission's findings as directed by section 252 of the Act. . . . We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus the incumbent LEC and competitive LEC

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[4] 47 U.S.C. § 252 (emphasis supplied).

[5] *Wisconsin Bell, Inc. v. Bie,* 340 F.3rd 441 (7th Cir 2003), *cert. denied,* 124 S. Ct. 1051 (2004) and *Verizon North, Inc. v. Strand,* 309 F3d 935 (6th Cir. 2002), *cert. denied,* 538 U.S. 946 (2003).

> must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes.[6]

Parsed, the directive states: "the incumbent LEC . . . *will implement* the Commission's findings as directed by section 252 of the Act." Verizon's conduct with respect to these issues is in facial violation of this requirement. It has not implemented the FCC's findings "as directed by section 252 of the Act." It has not negotiated or offered to negotiate in good faith. Instead, it has proposed to set "rates, terms and conditions necessary to implement [FCC] rule changes," through a process that bypasses all of its statutory, regulatory and contractual obligations. Verizon has defined an entirely new concept: negotiation by "website posting."

Petitioners are parties to interconnection agreements with Verizon that require negotiations and, if necessary arbitration, to amend those agreements and, thereby, modify the rights of the parties. Verizon has not complied with any aspect of these provisions. Instead, it seeks unilaterally to alter its rights under the interconnection agreements by simply ignoring those documents and instead posting its theses on its own door. In the process, it bypasses its obligations to CLECs to negotiate in good faith regarding both its substantive rights and the language that most accurately reflects those rights. It also bypasses and ignores the CLEC's right to have disputed issues resolved by arbitration before the Commission and, should it be necessary, ultimately by the courts.

II. VERIZON IS NOT ENTITLED TO UNILATERALLY DETERMINE WHETHER AND WHEN IT WILL CEASE PROVIDING ACCESS TO UNES NO LONGER SUBJECT TO SECTION 251(C)(3) UNBUNDLING

Verizon's implicit claim is that the *Triennial Review Remand Order* is dispositive of its rights with respect to UNEs no longer subject to unbundling under section

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[6] *Triennial Review Remand Order*, ¶233.

251(c)(3). That is simply incorrect. It has never been the case that Verizon's obligation to provision UNEs and UNE combinations existed solely and exclusively because of its obligations under Sections 251 of the 1996 Act. To the contrary, Verizon's obligations are to provision UNEs pursuant to "applicable law." "Applicable law" includes, at the very least, Verizon's obligations under the Bell Atlantic-GTE merger conditions,[7] under Section 271 of the 1996 Act, and under state law. Verizon's position is simply to ignore these legal obligations, and indeed the terms of its interconnection agreements that specify that it provision UNEs pursuant to "applicable law." The Department has yet to rule on these central issues of Verizon's obligations in a post-*Triennial Review Remand Order* environment. Procedurally, these issues are before the Department in the instant arbitration docket. By bypassing the pending arbitration process, Verizon deprives CLECs of their right to have this Department review such issues. Equally, Verizon's approach deprives the Department of the authority to resolve the disputed issues. Instead, Verizon has elected itself judge of its own interests, and declared on its website that it is relieved of all legal responsibility as a result of the *Triennial Review Remand Order*.

Verizon's failure to negotiate amendments to its interconnection agreements has other adverse and unlawful effects on Petitioners. Verizon goes beyond asserting its rights in the abstract, it insists on unilaterally setting the details that would otherwise be the product of negotiated or arbitrated contract language. Thus, for example, Verizon insists in its March 2 bulletin that the Tier 1 and Tier 2 wire center lists that it has

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[7] *Application of GTE Corporation, Transferor, and the Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum and Opinion Order, 15 FCC Rcd 14032, FCC 00-221 (2000).

submitted to the FCC are presumptively correct such that CLECs may be held to bad faith conduct and breach of their interconnection agreements for disagreeing with them. Verizon states that it will pursue claims on this basis if a CLEC submits a loop or transport order that ignores its wire center lists. In a piece of irony, Verizon hints that it will reject such orders as in breach of the interconnection agreements that it will not bother to amend. The FCC gave Verizon no such rights. Paragraph 234 of the *Triennial Review Remand Order* adopts a CLEC self-certification process for the submission of DS1 and DS3 loop and transport orders. Specifically, the FCC stated:

> We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in Parts IV, V and VI above, and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).[8]

Upon receipt of such self-certification, the FCC held, "the incumbent LEC must immediately process the request."[9]

Verizon's website language turns this process on its head, requiring CLECs in effect to give conclusive weight to lists of wire centers provided by Verizon but not certified by any public officials. That is beyond the reach of the FCC's rules and Verizon's authority. The Commission (and/or the FCC) will determine which wire centers fall into Tiers 1, 2 and 3: Verizon will not. Nor can Verizon unilaterally amend its lists without demonstrating to the relevant regulatory authorities that the facts so require. Nothing in the FCC's order and nothing in the telecommunications law allows

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[8] *Triennial Review Remand Order,* ¶ 234.

[9] *Id.*

Verizon to be the judge of its own facts. Until the FCC or this Commission makes such findings, the *Triennial Review Remand Order* clearly gives CLECs the obligation to conduct a "reasonably diligent inquiry" before submitting an order, while at the same time giving the CLECs the right to weigh *all* the evidence at its disposal, including Verizon's evidence and evidence that contradicts Verizon's lists of wire centers. If a CLEC certifies that it has made such an inquiry, Verizon "*must* immediately process the request." Disputes over whether particular Verizon wire centers are closed to particular UNEs and disagreements regarding whether orders were or were not submitted after a "reasonably diligent inquiry" must be resolved "through the dispute resolution procedures provided for in [ ] interconnection agreements."[10]

Finally, Verizon's bulletin board approach gives it one other major and unlawful advantage. The *Triennial Review Order* and the *Triennial Review Remand Order* are complex documents that alter a variety of rights on both sides of an interconnection agreement. CLECs, too, have new rights and opportunities, and they need to have those rights reflected in their interconnection agreements and, ultimately, in Verizon's behavior as a provider of services. CLECs are entitled to have those rights embodied in express provisions stating when they *are* entitled to certain UNEs, to clear contract language reflecting the FCC's withdrawal of its primarily local usage rules, to new language on commingling and routine network modifications, and to define rights and procedures for access to these elements pursuant to Section 271 of the 1996 Act. All of these would be subject for negotiation between Verizon and Petitioners, together with the issues that Verizon seeks to have addressed, in a single proceeding – as the FCC contemplated.

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[10] *Id.*

However, Verizon is essentially asserting that *its* rights may be activated by posting them on its website, while CLECs must seek negotiation and arbitration to obtain their rights. CLECs have no bulletin board.

The change of law provisions of the interconnection agreements are designed precisely to prevent this kind of disparate conduct. They are designed to require Verizon to negotiate over its rights and obligations and the rights and obligations of CLECs as well: to address both the issues that Verizon does and does not wish to discuss; and to negotiate on how to frame those rights in language.

In sum, a principal reason why CLECs requested and then fought for change of law provisions in their interconnection agreements was their experience that, left to its own devices, Verizon could and would ignore its contractual and legal obligations and engage – as it proposes to do here – in unilateral interpretation of its rights effectuated by self-help. For the foregoing reasons, Petitioners seek an order of this Department directing Verizon to continue to provision all UNEs and UNE combinations until it has negotiated and, if necessary arbitrated, changes to its interconnection agreements that effectuate the changes in law.

III. VERIZON'S OBLIGATION TO PROVIDE UNBUNDLED NETWORK ELEMENTS ENDURES UNDER SECTION 271, REGARDLESS OF THE AVAILABILITY OF THOSE UNBUNDLED ELEMENTS UNDER SECTION 251

Verizon's federal obligation to unbundle its network resides in Sections 251 and 271 of the 1996 Act. While each of these independent unbundling obligations affect the network elements at issue, Verizon premises its industry notices on its reading of the *Triennial Review Remand Order* alone. The *Triennial Review Remand Order* only

addresses Verizon's obligations under Section 251 of the Act; it does not address Verizon's obligations under Section 271.

Pursuant to Section 251, ILECs are required to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[11] To clarify the extent of the section's unbundling obligations and the FCC's authority over them, Subsection 251(d)(2) provides that:

> In determining what network elements should be made available for purposes of subsection (c)(3), the [FCC] shall consider, at a minimum, whether ... (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[12]

Any UNE unbundled pursuant to Section 251 must be offered at a rate no higher than a TELRIC rate. [13] When UNEs are "declassified" as Section 251 UNEs, however, the FCC has determined that the proper pricing standard is the 'just and reasonable' standard, not the TELRIC standard applicable to network elements unbundled under section 251.

A plain reading of the *Triennial Review Remand Order* reveals that the FCC's national finding of "no impairment" for unbundled local switching, dedicated DS1 and DS3 transport, and high-capacity DS1 and DS3 loops was solely based on its analysis of Section 251 unbundling standards.[14] It is unbundling under section 251 alone, therefore, that is limited by the *Triennial Review Remand Order*.

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[11] 47 U.S.C. § 251(c)(3).

[12] 47 U.S.C. § 252(d)(2).

[13] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, et al. (rel. August 8, 1996); *Verizon Comm., Inc. v. FCC*, 535 U.S. 467, (2002).

[14] *See, e.g., Triennial Review Remand Order* at ¶¶ 5, 20-23.

Verizon must make unbundled loops, transport, and local switching available to CLECs pursuant to Section 271. As the FCC re-affirmed in the *Triennial Review Order,* so long as Verizon wishes to continue to provide in-region interLATA services under section 271 of the Act, it "must continue to comply with any conditions required for [§271] approval,"[15] and that is so whether or not a particular network element must be made available under section 251.[16] Therefore, as a condition of continuing to provide in-region interLATA services in Massachusetts, Verizon must continue to offer CLECs unbundled high-capacity DS1 and DS3 loops, dedicated DS1 and DS3 transport, and local switching and UNE-P and cannot be permitted to circumvent that obligation as it proposes.

IV. CONCLUSION

Petitioners urge the Department, at the earliest possible time, to order:

- Verizon to continue accepting and processing UNE and UNE combination orders under the rates, terms and conditions of its Agreements;
- Verizon to comply with the change of law provisions of its Agreements with regard to the implementation of the *Triennial Review Remand Order*; and
- such further relief as the Department deems just and appropriate.

By taking these actions, the Department will enforce the provisions of the Agreements it approved and will uphold the letter and spirit of the *Triennial Review Remand Order* and Section 271 of the 1996 Act.

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[15] *Triennial Review Order* at ¶ 665.

[16] *See generally id.* at ¶¶ 653-655.

Respectfully submitted,

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Dated: March 4, 2005